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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 497

A & S ELECTRONIC DIE CORP. and
A & S STEEL RULE DIE CORP.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 3rd, 1970

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 4, 1970.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit—F. 2d—(2d Cir. March 11, 1970), slip opinion 1895, has not as yet, to counsel's knowledge, been officially reported. A copy thereof is annexed to the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on May 4, 1970. A copy thereof is appended to this petition in the appendix at page A-13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether interrogation of employees by the employer during a union organizational drive, wherein it is alleged that the employer praised a particular union and offered one employee a raise to desist from a particular union affiliation whose petition to intervene in a representation proceeding had been denied, constitutes a violation of Section 8(a)(1) of the National Labor Relations Act, or whether such acts are within the employers rights of free speech guaranteed under the First Amendment?

2. Whether praise of a particular union and the alleged distribution of signature cards for that union by two employees deemed by the Board to be supervisory constitutes a violation of Section 8(a)(1) and (2) of the National Labor Relations Act?

3. Whether substantial evidence on the record, considered as a whole, supports the majority opinion of the Court below that the company violated Section 8(a)(3) and (1) of the National Labor Relations Act by slightly reducing the overtime hours of one employee who had joined the Union?

Statutory Provisions Involved

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.)

Section 7—Right of Employees as to Organization, Collective Bargaining, Etc.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7; 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140.

Section 8(a)(1)—Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 8(a)(2)—

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

Section 8(a)(3)—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor

organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(c)—

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Statement of the Case

A & S Electronic Die Corp. and A & S Steel Rule Die Corp., Petitioners herein, operate as a single integrated business enterprise, engaged in the manufacture, sale and distribution of electronic dies and related products. The

two companies employ approximately seventy (70) employees at their plant located in Long Island City, County of Queens, City and State of New York.

On March 7, 1967 a Petition for Certification of Representation was filed with the National Labor Relations Board, 29th Region, Brooklyn, New York, by Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, for a bargaining unit limited to the four truck drivers employed by the companies.

On March 22, 1967, a Petition for Certification of Representation was filed by Local 106, International Production Service and Sales Employees Union, for a bargaining unit consisting of all production, maintenance, shipping and receiving employees, including the four aforementioned truck drivers.

Thereafter, the Regional Director of the National Labor Relations Board consolidated both petitions and held hearings which were completed on March 27, 1967. Subsequently, District 65, Retail, Wholesale, and Department Store Union, A.F.L.-C.I.O. solicited membership from employees of Petitioner and attempted to intervene by filing a Petition for Certification on March 31, 1967 for a bargaining unit consisting of "all production, shipping and receiving employees of Petitioner." The motion to intervene by District 65 was denied by the Regional Director on the grounds that the signature cards designating District 65 had not been solicited nor executed prior to the close of the hearing for Certification of March 27, 1967.

On October 17, 1967, the Regional Director for the 29th Region N.L.R.B., issued an "Order of Consolidating Cases, Second Consolidated Amended Complaint and Notice of Hearing."

The Second Consolidated Amended Complaint alleged that Petitioners engaged in unfair labor practices within the meaning of Section 8(a)(1)(2) and (3) of the Act. The Board's decision and Order were issued on August 9, 1968 and are reported at 172 N.L.R.B. No. 168.

The Board in said Decision made the following findings:

1. That the Company violated Sec. 8a(1) of the Act by promising employee Cruz a raise if he would abandon his union affiliation and by interrogating employees Reynolds, Rivera, Sojourner and Geller concerning their union membership and activities;

2. That the Company, through its agents Solmsen, Lobbenburg and Klein, assisted Local 106, International Production, Service and Sales Union in violation of Section 8(a)(1) and (2) of the Act;

3. That the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily reducing the overtime hours of drivers Cruz and Reynolds because of their union activities.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "(i)n any other manner" interfering with, restraining or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act. Affirmatively, the Company was required to make whole employees Israel Cruz and Andrew Reynolds for any loss of overtime pay they may have suffered by reason of the alleged discrimination practiced against them and to post appropriate notices.

On September 4, 1969, the National Labor Relations Board petitioned the United States Court of Appeals for the Second Circuit for enforcement of its Order. The Cir-

cuit Court of Appeals, by a split decision, granted enforcement of the Board's Order in part. It granted enforcement insofar as the allegations relating to the interrogations of Cruz and Geller, the alleged activities in support of Local 106 and the reduction of Reynolds' overtime. It denied enforcement as to those portions of the Board's Order which relate to the questioning of Reynolds, Rivera and Sojourner and the reduction in Cruz' overtime. The dissenting Justice Tyler differed with the majority on three issues, the principal one of which had to do with what he considered to be a denial of the employer's First Amendment rights and the Board's tendency to condemn virtually all anti-union expression by an employer, notwithstanding Section 8(c) of the National Labor Relations Act. The Court's judgment was filed on May 4th, 1970.

Reasons for Granting the Writ of Certiorari

I. The Board's finding that the Company violated Section 8(a)(1) of the Act with promises of benefit and by interrogating employees is not supported by substantial evidence in the record, and constitutes a denial of the employer's rights under the First Amendment.

A. Interrogation

The evidence contained in the record relating to the allegation that the Company unlawfully interrogated Geller in violation of Section 8(a)(1) of the Act was partially rejected by the Circuit Court at page 1901;

> "Most of Solmsens' conversation with Geller was free from 'threat of reprisal or force or promise of benefit' and was not in violation of Section 8(a)(1): but Solmsen expressly solicited Geller to sign a card in favor of Local 106 as bargaining agent."

Solmsen had no further conversation with Geller at that time, or at any subsequent time relating to the union.

It is submitted that Solmsen's alleged statement to Geller, which was denied by Solmsen, *even if it was made,* did not constitute a violation of Section 8(a)(1) of the Act.

The United States Court of Appeals for the Second Circuit, in a landmark case, has held that an employer may make inquiry concerning membership of employees in a union during an organization campaign, provided such inquiry contains no threats or promises. *NLRB* v. *Associated Dry Goods Corp.*, 209 F. 2d 593 (CA 2, 1954).

The record contains no evidence that Solmsen threatened Geller in this interview or that he made promises of benefits to him. The circumstances of the conversation with Geller did not tend to restrain or coerce him and did not occur in the context of a manifestation of employer hostility to union activity.

In *Coamo Knitting Mills, Inc.*, 150 NLRB 35 (1964), the Board held that the employer did not violate Section 8(a)(2) of the Act by delivering speeches to employees to join, since said speeches contained neither promises of benefits to induce employees to join the union, nor threats of reprisal if they failed to do so.

A singular expression of management opinion could not amount to a "general pattern or course of conduct which constitutes coercion and deprive employees of their free choice". *Irving Air Chute Company* v. *NLRB*, 350 Fed. 2nd 176, 180 (1965).

In his dissent in the circuit court opinion, Justice Tyler stated on Page 1903:

> "Recent cases in this circuit and elsewhere seem to have staunched an earlier flow of judicial pronouncements tending to ignore employers' First Amendment rights. This flood was and at least occasionally

> still is encouraged by decisions of the Board tending to condemn virtually any and all anti-union expression by an employer without giving sufficient weight to Section 8(c). As I understand the current case law in this circuit, however, 8(c) must be read to permit the employer a certain degree of latitude in expressing his point of view when faced with unionization. *NLRB* v. *Golub Corporation*, 388 F.2d 921 (2 Cir. 1967); accord *Schwarzenbach-Huber Company* v. *NLRB*, 408 F.2d 236, 252-255 (2 Cir. 1969). By the terms of that section, to constitute a violation of 8(a)(1) or (2), statements made by or on behalf of an employer must contain some 'threat of reprisal or force or promise of benefit.' I believe that the majority opinion effectively vitiates this principle".

This Court in *NLRB* v. *Gissel Packing Co.*, 395 US 575, 618 (1969) held:

> "An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit' ".

In the instant case, there is no evidence whatsoever that the employer threatened Geller or made any promise of benefit. The evidence is all to the effect that the employer spoke highly of a particular union and asked one employee if he would "sign a 106 card as a favor to him". Even this alleged conversation, which was denied by the employer, was supposed to have taken place after the particular union which that employee had joined had been denied its motion to intervene in the representation proceedings. The evidence is ample that the employee declined the employer's suggestion and suffered no reprisal whatsoever.

In view of the foregoing, this Court is urged to reverse that portion of the enforcement Order of the Court below

which held that the company violated Section 8(a)(1) of the National Labor Relations Act.

B. Alleged Promise of Benefit or Interference

The only evidence adduced by the General Counsel to support the allegation that Respondents promised an employee a wage increase if he would abandon his Union affiliation is contained in the testimony of Israel Cruz. Cruz testified that he was summoned to the office of the president of the Petitioners by Walter Solmsen on or about March 18th, 1967. Cruz stated that Solmsen called him into his office alone and offered to give him a $10.00 a week raise if he would forget about the union. Cruz further testified that as he left Solmsen's office, employees Rivera and Ramos entered. He insisted that no one else was present in Solmsen's office at the time he was allegedly offered the $10.00 raise.

The Board found Cruz to be "a credible witness *on this subject*", notwithstanding Solmsen's denial that he made such an offer and notwithstanding testimony that he did not speak to Cruz alone in his office. It is submitted that the Trial Examiner's credibility finding with respect to the alleged promise of a wage increase to Cruz is without foundation and in conflict with his credibility finding with respect to the incidents surrounding Cruz' discharge. The Trial Examiner found that Cruz testified incredibly when he stated that Solmsen refused to accept proof of illness relating to Cruz' absence during August, 1967. Moreover, in evaluating the credibility of Cruz' testimony with respect to the alleged unlawful interrogation, the Trial Examiner completely ignored the fact that Cruz had been discharged by the employer in August, 1967 under admittedly unpleasant circumstances (arrest of Cruz for transporting narcotics in company truck). Cruz, in fact, was openly hostile

and antagonistic to Petitioners during the course of his testimony in this proceeding and at the time of his discharge threatened Solmsen.

In view of the fact that Cruz was hostile to the Company because of his discharge, and because of the fact that the Trial Examiner gives no reason for crediting Cruz on the subject of his testimony concerning the alleged promise of a wage increase, while discrediting him concerning his discharge, the Court is respectfully urged to reverse the Board's finding that the Company violated Section 8(a)(1) of the Act by promising an employee a raise to induce him to abandon his Union affiliation.

Even assuming, *arguendo,* that the employer did in fact make this offer to one employee, it certainly did not amount to

> "a general pattern or course of conduct which constitutes coercion and deprives employees of their free choice". *Irving Air Chute Company* vs. *NLRB.* 350 Fed. 2nd 176, 180 (1965).

II. The Board's finding that the company violated Section 8(3) of the Act by the reduction of overtime work to employee Andrew Reynolds because of his Union activities is not supported by the record.

The Board based its findings that Reynolds had been discriminated against with respect to overtime on the following rationale:

(a) Reynolds signed up with the Teamsters Union.

(b) Sojourner did not.

(c) Thereafter, Reynolds' overtime was reduced while Sojourner's increased.

In March 1967 Respondents employed four truck drivers: Israel Cruz, Andrew Reynolds, Juan Rivera and John Sojourner. During the months of January, February and March of 1967 employee Sojourner earned $874.00, Cruz earned $395.00 and Reynolds earned $201.00 for overtime work. During the second calendar quarter of 1967, Sojourner's overtime earnings increased $42.00 while Reynold's overtime earnings decreased $153.00 and Cruz' overtime earnings decreased $318.00. Rivera worked little overtime in the first and second quarters of 1967, and overtime earnings remained constant. In July of 1967, Rivera's overtime earnings increased substantially.

At the hearing the General Counsel failed to adduce any independent evidence that Reynold's overtime was reduced for the purpose of discouraging his Union activities and membership. Moreover, the Board in making such finding does not cite any evidence in support thereof. Rather, the Board has made the unsupported inference that the Petitioner acted in violation of the law, such inference being based solely upon the coincidence in point of time in Local 807's demand for recognition and the decrease in overtime hours work.

The Circuit Court dismissed the Board's findings with regard to Cruz and stated on pg. 1902;

> "With regard to Cruz, however, the Trial Examiner found on ample evidence that the company was justified in dismissing Cruz because of his frequent absences from work and because he was using the company's truck after hours for illicit activities involving the transportation of narcotics. The improper use of the truck also justified the company in stopping his use of it in overtime work, for it was the overtime use which made the truck available to him for his own purposes."

Nevertheless, the Trial Examiner still found that Cruz was denied some overtime because of his affiliation with the union. The Court below reversed this finding on the grounds that it was not supported by the evidence.

However, with regard to Reynolds, the Board's Order was confirmed and enforcement granted. There is no evidence in the record that the overtime work previously performed by Reynolds was subsequently performed by any other employee. The mere fact that Sojourner earned $42 more in overtime pay during the entire second quarter (of a total of $916 in overtime pay which he earned in that quarter) is not the kind of evidence sufficient to support the Board's contention. The large increase in overtime pay earned by Sojourner came in the third quarter after Reynolds had quit and during the period in which Cruz was absent frequently. Based on this evidence, the assertions made by the Board are mere speculation and an attempt to attribute to trivia, substantive findings of discriminatory intent.

It is respectfully submitted that the Board failed to prove by a *preponderance* of evidence that Petitioner reduced Reynold's overtime because of his having joined a union.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

FRIEDLANDER, GAINES, RUTTENBERG & GOETZ
Counsel for Petitioner

JOSEPH S. ROSENTHAL
Of Counsel.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 418—September Term, 1969.

(Argued February 3, 1970 Decided March 11, 1970.)

Docket No. 33994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

A & S ELECTRONIC DIE CORP. and A & S STEEL RULE DIE CORP.,

Respondents.

Before:

WATERMAN and ANDERSON, *Circuit Judges,* and TYLER, *District Judge.**

Petition by NLRB for enforcement of its order that respondents cease and desist from certain activities violative of §§8(a)(1), (2) and (3) of the National Labor Relations Act and to make whole certain employees for lost overtime wages. Order enforced in part.

STANLEY J. BROWN, Esq., National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and John D. Burgoyne, Esq., National Labor Relations Board, Washington, D. C., on the brief), *for Petitioner.*

JOSEPH S. ROSENTHAL, Esq., New York, N. Y. (Friedlander, Gaines, Ruttenberg & Goetz, New York, N. Y., on the brief), *for Respondents.*

ANDERSON, *Circuit Judge:*

* Of the Southern District of New York, sitting by designation.

Opinion

The A & S Electronic Die Corp. and the A & S Steel Rule Die Corp. are affiliated companies which are operated as single business enterprise. The A & S factory, at which approximately 70 non-supervisory workers are employed, is located in Long Island City, Queens. Prior to the events which brought about the present petition,[1] A & S had experienced no union organizing activity.

The facts found by the Trial Examiner were substantially as follows. On March 2, 1967, Israel Cruz, one of the four A & S truck drivers, signed an authorization card for Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and he secured the signatures of two of his fellow drivers, Andrew Reynolds and Juan Rivera. Their cards were turned over to the Teamsters' local, which, on March 7, filed a petition with the Board for a unit limited to the four A & S drivers. At the same time it sent a letter to Walter Solmsen, president of A & S, requesting recognition as bargaining agent for the drivers.

Solmsen, who had not been aware of any union activity, called the drivers to his office on March 8th. Cruz arrived first and conversed privately with Solmsen. Solmsen told Cruz that he had received a letter from the Teamsters, and asked if Cruz was one of the employees who favored unionization. When Cruz said that he was, Solmsen stated "maybe we can settle this without a union" and offered Cruz a $10 per week raise if he would "forget the union."

1. Unfair labor practice charges were filed by District 65 of the Retail, Wholesale and Department Store Union, AFL-CIO, and by Israel Cruz, a former employee, against the company. The various proceedings were consolidated and a hearing was held before the Trial Examiner on December 4, 1967.

When Cruz rejected the offer, Solmsen said if the men wanted a union, he would not fight it.

The other three drivers, Reynolds, Rivera and John Sojourner then arrived at Solmsen's office, and Solmsen repeated that the Teamsters claimed to represent a majority of the drivers, and asked if this were true. Rivera and Reynolds both said that they had signed for the union, but Sojourner said that he had not. Solmsen again stated that if they wanted a union, they could have one, and terminated the interview.

About a week after the interviews, organizers of another union, Local 106 of the International Production, Service and Sales Union, appeared at the A & S truck bay during the employees' lunch break, passed out authorization cards and urged the men to sign up. Elliot Klein, the A & S purchasing clerk, and Kurt Lobbenberg (known as Loeb), the A & S shipping foreman, were present. Loeb, who was handing the men cards for Local 106, and Klein urged them to sign, stating "it is a good union, sign the card" and "the boss won't mind."

Solmsen himself also made some efforts on behalf of Local 106. Shortly thereafter, Solmsen summoned Robert Geller, an inspector for A & S, and asked if he would sign a Local 106 card "as a favor." Geller declined, but indicated he would not oppose that union. Not long afterwards, however, Geller became active in the organizational efforts of a third union, District 65 of the Retail, Wholesale and Department Store Union, AFL-CIO. When Solmsen learned of Geller's activity on behalf of District 65, he again called Geller to his office and asked him why he had changed his mind and had become "involved." When Geller

stated that he felt District 65 would be the best union for the employees, Solmsen indicated that things would remain the same no matter which union was chosen, and the conversation ended.

Prior to the receipt by Solmsen of the letter from the Teamsters, both Cruz and Reynolds were receiving substantial overtime work. Following the interviews of March 8, the overtime of both these drivers was reduced to less than one hour per week, while that of Sojourner, who had not signed a Teamsters' authorization, showed significant increases. Rivera, who had signed an authorization card, had received little or no overtime work prior to March 8, and his situation remained unchanged. A & S offered no explanation for the drop in Reynolds' overtime, but did show that Cruz had been arrested by the New York police on narcotics charges (which were subsequently dismissed) and that marijuana cigarettes had been found in his truck on one occasion when another driver took over for Cruz. In addition, Cruz was habitually absent from work and refused to explain his truancy.[2]

Trial Examiner Martin concluded that (1) A & S had violated §8(a)(1) of the Act, 29 U.S.C. §158(a)(1), by offering a raise to Cruz and by interrogating Reynolds, Rivera, Sojourner and Geller as it did; (2) it had violated §§8(a)(1) and (2), 29 U.S.C. §§158(a)(1) and (2), by the soliciting of Klein and Loeb on behalf of Local 106; and (3) it had violated §§8(a)(1) and (3), 29 U.S.C. §§158(a)(1) and (3), by reducing the overtime work given to Cruz

2. The complaint had also charged that the dismissal of Cruz on August 28, 1967, was in retaliation for his union activities. The Trial Examiner and the Board both found the dismissal justified and that question is, therefore, not before us.

and Reynolds. The Board, without discussion, substantially adopted the Trial Examiner's findings, conclusions and recommendations, and issued a cease and desist order together with orders to post the standard notice for sixty days and to make whole Cruz and Reynolds for their losses in overtime pay. 172 N.L.R.B. No. 168 (1968).

With regard to the offer of a $10 per week wage increase to Cruz, it is clear that such an offer, made to induce an employee to forswear his pro-union predilections, is violative of §8(a)(1). *Waycross Sportswear, Inc.* v. *NLRB*, 403 F.2d 832, 835 (5 Cir. 1968); *NLRB* v. *Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (2 Cir.) *cert. denied*, 370 U.S. 919 (1962). The company attacks the facts found on this point by arguing that "the trial examiner's credibility finding . . . is without foundation." But this court has consistently held that the question of credibility is to be resolved by the trial examiner. See *NLRB* v. *Dinion Coil Co.*, 210 F.2d 484, 487-490 (2 Cir. 1952); *NLRB* v. *L. E. Farrell Co.*, 360 F.2d 205, 207 (2 Cir. 1966).

The interrogation of Reynolds, Rivera and Sojourner presents a different question. When Solmsen received the letter from the Teamsters requesting recognition, he had a right to inquire of his employees whether they indeed desired such union representation. There are no indications that Solmsen threatened these three employees or in any way atempted to lure them away from the union. The questioning was neither harsh nor coercive; on the contrary, the atmosphere was apparently rather informal.[3]

3. The only testimony on this point was that of Solmsen, himself. On direct examination he stated:

"Q. Now, tell me exactly what happened at this Meeting? A. I called the men in and I told them that I was very surprised to receive a letter by the Teamsters Union that the drivers have

Where the employer's questions are designed simply to determine the true status of the union and are in no way threatening or coercive so as to inhibit the employees' organizational activities, there is no violation of §8(a)(1). See *NLRB* v. *Firedoor Corp. of America*, 291 F. 2d 328, 331 (2 Cir.), *cert. denied*, 368 U. S. 921 (1961); *Bourne* v. *NLRB*, 332 F. 2d 47 (2 Cir. 1964); *NLRB* v. *Milco, Inc.*, 388 F. 2d 133, 137-138 (2 Cir. 1968). Most of Solmsen's conversation with Geller was free from "threat of reprisal or force or promise of benefit," and was not in violation of §8(a)(1); but Solmsen expressly solicited Geller to sign

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signed up and that they have the majority of my drivers, and I wanted to know whether this was true.

And as this was confirmed to me, I said I can't understand you boys, you have good jobs here and I can't see any benefits by a union, but if you feel that this is what you want, you can have it. I am not going to fight any union at all.

Q. Did you say anything else to them? A. I don't think so.

Q. Well, do you recall saying anything else to them? A. I did not."

On cross-examination by the General Counsel, Solmsen merely confirmed his earlier testimony:

"Q. Did you ask them if they signed cards for 107? A. I don't know what I said. I didn't even know that you have to sign cards at that time. I may have said did you call in the union. They write they have the majority so is that true? They may have answered yes.

Q. Did they answer yes, did you know whether they had the majority? A. Yes, three men said yes.

Q. Which three men said yes? A. Israel Cruz, Juan Rivera and Andy Reynolds, and John Sojurner said he didn't sign."

The finding by the Trial Examiner, based on Solmsen's testimony was:

"On cross-examination he was vague and uncertain as to what he had asked the drivers and said to them. He admitted he may have asked them if they 'call[ed] in the union,' and that three of them: Cruz, Reynolds and Rivera replied 'Yes,' and the fourth Sojurner, replied that 'He didn't sign.'"

a card in favor of Local 106 as bargaining agent. Geller also testified that Sohnsen assured him that, if Local 106 got in, things in the shop would continue as they had been, with no change in Geller's personal position, carrying with it the obvious implication that things would be different if another union got in. This was sufficient to support the Board's conclusion that the company was in violation of §§8(a)(1) and (2). *NLRB* v. *Midtown Service Co., Inc.*, —— F. 2d —— (2 Cir. Feb. 25, 1970), slip opinion 1659 at 1663.

The company also contests the Board's finding that the solicitations by Klein and Loeb on behalf of Local 106 were violative of §§8(a)(1) and (2). It does not challenge the finding that Klein and Loeb were supervisors within the meaning of §2(11) of the Act, 29 U.S.C. §152(11), but it asserts that their actions were not improper because "no other labor organization was attempting to organize the production and shipping employees of respondents." The absence of a competing union, however, does not insulate an employer from the finding of an unfair labor practice union. *Abinante & Nola Packing Co.*, 26 N.L.R.B. 1288, 1316-1317 (1944). See *Revere Copper & Brass, Inc.* v. *NLRB*, 324 F. 2d 132, 136 (7 Cir. 1963). Where supervisory personnel distribute union authorization cards to employees and urge them to sign because "it is a union with good benefits" and "the boss approves of it," it can hardly be said that the company was not supporting the formation of a labor union or interfering with the organizational rights of its employees, nor are such actions protected within the meaning of §8(c), 29 U.S.C. §158(c). *Irving Air Chute Co.* v. *NLRB*, 350 F.2d 176, 180-181 (2 Cir. 1965).

Opinion

The Board's conclusion that A & S violated §§8(a)(1) and (3) by reducing the overtime work of Cruz and Reynolds because of their union activities is fully supported by the record as far as Reynolds is concerned. See *NLRB* v. *Buddy Schoellkopf Products, Inc.*, 410 F.2d 82, 86-87 (5 Cir. 1969); *Trumbull Asphalt Co. of Delaware* v. *NLRB*, 314 F.2d 382, 383 (7 Cir.), *cert. denied*, 374 U.S. 808 (1963). Cf. *Gulf Building Corp.*, 159 N.L.R.B. 1621, 1631-1632 (1966). With regard to Cruz, however, the Trial Examiner found on ample evidence that the company was justified in dismissing Cruz because of his frequent absences from work and because he was using the company's truck after hours for illicit activities involving the transportation of narcotics. The improper use of the truck also justified the company in stopping his use of it in overtime work, for it was the overtime use which made the truck available to him for his own purposes.[4] The Trial Examiner found, however, that that did not necessarily excuse the deletion of Cruz's overtime between 4:30, the standard closing time, and 6:30 p.m. when Cruz customarily took the parcels to the Post Office for mailing. The company urges that for the same justifiable reasons it arranged to have the mailing taken care of by other means. The mere coincidence of the time of the termination of the overtime use of the truck by Cruz and the union's effort at organization of the plant do not support the conclusion that the limitation on his use of the truck was a reprisal for his

4. As the Board said in its brief, p. 20:

"If, however, the driver was required to work beyond 6:30 P.M., such as to take orders to the Post Office, he could not return the truck to the plant because it was closed. Accordingly, in that case, the driver was permitted to take the truck home overnight and return it the next morning."

pro-union activities, in the absence of any supporting evidence offered by the General Counsel.

On the record as a whole, as it bears on the issue of Cruz's overtime, we are of the opinion that the Board's conclusion is not supported by substantial evidence and enforcement of that portion of the order should not be granted.

Enforcement of the Board's order is granted insofar as it relates to the interrogations of Cruz and Geller, the activity in support of Local 106, and the reduction of Reynold's overtime. As to those portions of the order which relate to the questioning of Reynolds, Rivera and Sojourner and the reduction in Cruz's overtime, enforcement is denied.

TYLER, *District Judge* (dissenting in part):

I disagree with the opinion of the court on three issues.

1. I would deny enforcement of that part of the order which found that A & S had violated §§8(a)(1) and (2) of the Act through "the soliciting" by Klein and Loeb on behalf of Local 106. In my view, the unrepeated statements of Klein and Loeb fell far short of constituting a pattern of coercion of A & S employees and thus should be regarded as protected by §8(c) of the Act.

Recent cases in this circuit and elsewhere seem to have stanched an earlier flow of judicial pronouncements tending to ignore employers' First Amendment rights. This flood was and at least occasionally still is encouraged by Decisions of the Board tending to condemn virtually any and all anti-union expression by an employer without giv-

ing sufficient weight to §8(c).[1] As I understand the current case law in this circuit, however, §8(c) must be read to permit the employer a certain degree of latitude in expressing his point of view when faced with unionization. *NLRB* v. *Golub Corporation*, 388 F.2d 921 (2 Cir. 1967); accord, *Schwarzenbach-Huber Company* v. *NLRB*, 408 F. 2d 236, 252-255 (2 Cir. 1969). By the terms of that section, to constitute a violation of §(a)(1) or (2), statements made by or on behalf of an employer must contain some "threat of reprisal or force or promise of benefit." I believe that the majority opinion effectively vitiates this principle.

True, there is undisputed evidence that Klein and Loeb, as supervisory agents acting for Solmsen, made it known to various other employees that Solmsen considered Local 106 to be a good union and was not opposed to it. Significantly, as I see the problem, most of this comparatively mild activity occurred during a single afternoon. Nobody was pressured or even exhorted to any appreciable extent. Hence, taking the evidence in the best light for the Board, I am at a loss to understand how this expression of management opinion by Klein and Loeb amounted to a "*general pattern or course of conduct* which constitute[d] coercion and deprive[d] employees of their free choice." *Irving Air Chute Company* v. *NLRB*, 350 F.2d 176, 180

1. "(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

(2 Cir. 1965); cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969).[2]

2. A similar view, it seems to me, is justified in respect to the issue of Solmsen's conversations with Geller. These conversations took place in a general office with a number of non-management people nearby; they were certainly informal.[3] Solmsen, of course, intended to influence Geller and in effect manifested his disapproval of Geller's association with District 65. But these conversations amounted to nothing more than the natural and, under the circumstances, remarkably temperate reaction of a small businessman faced for the first time with the unionization of his business. Absent threats or coercion, §8(c) permits an employer to make known his argument or opinions on a matter by which he is so directly affected. As I read the record, there were no threats, overt or implied, by Solmsen (Appendix 55-57); indeed, Geller admitted that Solmsen promised him that his, Geller's, position would not suffer or change if by chance Local 106 "were to get in" despite Geller's refusal to sign with that union. Arguably, of course, one could construe Solmsen's remarks (Appendix 57) as a veiled threat of dire consequences to Geller if 106 did not get in, but I cannot believe that either this court or the Board has meant to rely on such morbid conjecture.

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2. "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" At p. 618.

3. Of considerable importance is the fact that A & S in 1967 was a small "one-man" enterprise with relatively few employees. The record plainly shows that there was a significant blurring of the line between management and labor. Informality was the rule. Thus, a favorable climate for oppression and coercion was notably absent.

Opinion

3. Finally, I would deny enforcement of the order respecting the allowance of lost overtime to Reynolds, a driver, as well as to Cruz. Essentially, the trial examiner based the allowance to Reynolds on the following simplistic rationale: (1) Reynolds signed with the Teamsters; (2) driver Sojourner did not; (3) subsequently Reynolds' overtime fell off but Sojourner's increased; (4) it follows as day from night that the sole cause of (3) was the employer's desire to penalize Reynolds for his Teamsters affiliation. But there are other facts in the record. Reynolds earned $201 for overtime work during the first quarter of 1967; he earned $48.58 for overtime work during the second quarter; he earned $8.33 for overtime work from July 1 through 26 when he left the company. For overtime work, Sojourner earned $874 during the first quarter of 1967, $916 during the second quarter and $1,107 during the third quarter. There is no evidence, however, of the kind of overtime work done by either Reynolds and Sojourner.

As the foregoing recital indicates, there was an increase of $42 in Sojourner's overtime pay during the second quarter, but his large increase in overtime, $233, came not until the third quarter—i.e. after Reynolds had quit and during the period of Cruz's frequent absences. In sum, there is nothing to indicate that Reynolds' loss was in any way related to Sojourner's gain during the relevant period—except bald speculation that Reynolds' Teamsters affiliation compelled Solmsen to discriminate. Balancing such speculation against the known facts, I would hold that there is sufficient evidence to justify award of the allowance to Reynolds as well as to Cruz.

Dated: New York, N. Y.
March 4, 1970

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17,479

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

A & S ELECTRONIC DIE CORP. and
A & S STEEL RULE DIE CORP.,
Respondent.

Before: Waterman and Anderson, Circuit Judges, and Tyler, District Judge.*

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board to enforce its order issued on August 9, 1968, against A & S Electronic Die Corp. and A & S Steel Rule Die Corp., their officers, agents, successors and assigns. The Court heard argument of respective counsel on February 3 1970, and has considered the briefs and transcript of record filed in this cause. On March 11, 1970, the Court being fully advised in the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that A & S Electronic Die Corp. and A & S Steel Rule Die Corp., their officers, agents, successors and assigns shall:

* Of the Southern District of New York, sitting by designation.

Judgment

1. Cease and desist from:

(a) Promising employees raises if they will abandon their union affiliation.

(b) Unlawfully interrogating employees in a threatening or coercive manner as to why they have changed their minds from resisting to favoring union affiliation.

(c) Reducing the overtime hours of employees because of their union activity and to discourage membership and activity of its employees in a union.

(d) Assisting Local 406, International Production, Service and Sales Employees Union or any other union in its efforts to sign up employees of Respondent, for the purpose of blocking and overcoming any of its employees' choice of another union.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization of their choice, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Make whole Andrew Reynolds for any loss of overtime pay he may have suffered by reason of the

discrimination practiced against him, in accordance with the recommendations set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due and the rights of employees under the terms of this Judgment.

(c) Post at its plant in Brooklyn, New York, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 29 (Brooklyn, New York) shall be posted by Respondent after being duly signed by its representative, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director in writing, within 10 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Filed: May 4, 1970

STERRY R. WATERMAN
Judge, United States Court of Appeals for the Second Circuit

ROBERT P. ANDERSON
Judge, United States Court of Appeals for the Second Circuit

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Judgment of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT promise employees raises if they will abandon their union affiliation.

WE WILL NOT unlawfully interrogate employees in a threatening or coercive manner as to why they have changed their minds from resisting to favoring union affiliation.

WE WILL NOT reduce the overtime hours and pay of employees because of their union activity and in order to discourage membership and activity in any union.

WE WILL NOT assist Local 106, International Production, Service and Sales Employees Union or any other union in its efforts to sign up any of our employees, for the purpose of blocking and overcoming any of our employees' choice of another union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such

activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make whole Andrew Reynolds for the loss of overtime pay suffered by him by reason of the discrimination practiced against him, in accordance with the recommendations of the Trial Examiner's Decision.

All our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization.

A & S ELECTRONIC DIE CORP.
A & S STEEL RULE DIE CORP.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 596-3535.

Decision and Order.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

A & S Electronic Die Corp.,

and

District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

and

Local 106, International Production, Service and Sales Employees Union.

Case 29-CA-963.

A & S Steel Rule Die Corp.,

and

District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

and

Local 106, International Production, Service and Sales Employees Union.

Case 29-CA-1033.

A & S Electronic Die Corp.,

and

Israel Cruz.

Case 29-CA-1084.

On May 16, 1968, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that

172 NLRB No. 168.

the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the General Counsel, Charging Party, and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,[1] conclusions,[2] and recommendations[3] of the Trial Examiner.

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1. These findings and conclusions are based, in part, upon the credibility determinations of the Trial Examiner, to which the Respondent excepts. On the basis of our own careful review of the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C. A. 3).

2. We agree with the Trial Examiner that the Respondent's interrogation of all the drivers violated Section 8(a)(1).

3. The Trial Examiner failed to provide 6 percent interest per annum in accord with *Isis Plumbing & Heating Co.*, 138 NLRB 716, on the backpay due Cruz and Reynolds by reason of the discriminatory withholding of overtime work. The remedy is hereby revised to provide for such interest. In addition, the Trial Examiner failed in his Recommended Order to mention specifically Local 106, International Production, Service and Sales Employees Union as the assisted union. We find that the naming of the assisted Union in the Order and Notice will better remedy the unfair labor practices found herein.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, A & S Electronic Die Corp and A & S Steel Rule Die Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete the words "Assisting a union" from paragraph 1(d) of the Trial Examiner's Recommended Order and substitute therefor the words: "Assisting Local 106, International Production, Service and Sales Employees Union or any other union."

2. Delete the words "WE WILL NOT assist any union" from the fourth paragraph of the Notice and substitute therefor the words: "WE WILL NOT assist LOCAL 106, INTERNATIONAL PRODUCTION, SERVICE AND SALES EMPLOYEES UNION or any other union."

IT IS HEREBY FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D. C., Aug. 9, 1968.

FRANK W. McCULLOCH, *Chairman,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*

(SEAL)

NATIONAL LABOR RELATIONS BOARD.

Order Correcting Decision and Order.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

A & S Electronic Die Corp.,

and

District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

and

Local 106, International Production, Service and Sales Employees Union.

Case 29-CA-963.

A & S Steel Rule Die Corp.,

and

District 65, Retail, Wholesale and Department Store Union, AFL-CIO,

and

Local 106, International Production, Service and Sales Employees Union.

Case 29-CA-1033.

A & S Electronic Die Corp.,

and

Israel Cruz

Case 29-CA-1084.

On August 9, 1968, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which an inadvertent error appears.

1. 172 NLRB No. 168.

Order Correcting Decision and Order

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, corrected by striking from the ninth line on page 1 the words "Charging Party."

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., November 26, 1968.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

Trial Examiner's Decision.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
Washington, D. C.

A & S ELECTRONIC DIE CORP.,

and

DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

and

LOCAL 106, INTERNATIONAL PRODUCTION, SERVICE AND SALES EMPLOYEES UNION

Case 29-CA-963.

A & S STEEL RULE DIE CORP.,

and

DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

and

LOCAL 106, INTERNATIONAL PRODUCTION, SERVICE AND SALES EMPLOYEES UNION

Case 29-CA-1033.

A & S ELECTRONIC DIE CORP.,

and

ISRAEL CRUZ.

Case 29-CA-1084.

David Lew, Esq., for the General Counsel.

Joseph S. Rosenthal, Esq., of New York, N. Y., for Respondent.

Mr. Israel Cruz, of New York, N. Y., representing himself.

Trial Examiner's Decision

STATEMENT OF THE CASE

ALBA B. MARTIN, Trial Examiner: This proceeding was heard before me in Brooklyn, New York, on December 4 and 5, 1967, on complaint of the General Counsel and answer of A & S Electronic Die Corp. and A & S Steel Rule Die Corp., jointly referred to herein as Respondent.[1] The issues litigated were whether from March until August 1967 Respondent violated Section 8(a)(1), (2) and (3) of the National Labor Relations Act, as amended, 29 U.S. C. Sec. 151 *et seq.*, herein called the Act, by interrogations and promises, by soliciting employee signatures on a union's representation cards, and by reducing the overtime of Reynolds and Cruz and later discharging Israel Cruz. After the hearing the General Counsel and Respondent each filed a helpful brief, which has been carefully considered.

Upon the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

A & S Electronic Die Corp. and A & S Steel Rule Die Corp., New York corporations herein collectively called Respondent, are, and at all times material herein have been, affiliated businesses with common officers, ownership,

1. The charge in Case 28-CA-963 was filed by District 65, Retail, Wholesale and Department Store Union, AFL-CIO, herein called District 65, on April 20, 1967. District 65 filed the charge in Case 29-CA-1033 on June 28, 1967. An individual, Israel Crtiz, filed a charge in Case 29-CA-1084 on August 28, 1967. The Regional Director's order consolidating the cases, and his second consolidated amended complaint and notice of hearing, were issued on October 17, 1967.

directors and operators engaged in business in the same premises, and constitute a single integrated business enterprise. The said directors and operators formulate and administer a common labor policy for the two named corporations, affecting the employees of said corporations. At all times material herein these two corporations have been joint employers of the employees involved herein. At its principal office and place of business located in the Borough of Queens in the city and State of New York, herein called the Plant, Respondent is engaged in the manufacture, sale and distribution of electronic dies and metal stamping and related products. During the year prior to the issuance of the second consolidated amended complaint in October 1967, which period is representative of its annual operations generally, Respondent manufactured, sold and distributed at its plant products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said plant in interstate commerce directly to States of the United States other than the State in which it is located. Respondent admitted, and I find, that Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. The Labor Organizations and their Appearances

Respondent admitted, and I find, that each of the three Unions involved herein is a labor organization within the meaning of Section 2(5) of the Act. These Unions are Local 106, International Production, Service and Sales Employees Union, herein called Local 106; Local 807, In-

ternational Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 807 and the Teamsters; and one of the Charging Parties, District 65, Retail, Wholesale and Department Store Union, AFL-CIO, herein called District 65.

First on the scene was Local 807, brought by Israel Cruz on and shortly after March 2, 1967. Next was Local 106, which appeared around the middle of March. Last was District 65, which arrived late in March.

III. The Unfair Labor Practices

A. *Promise of Benefit and Interogation*

The first Union on the scene was Local 807 of the Teamsters. Israel Cruz, one of Respondent's four drivers, sought out the Teamsters, signed one of its authorization cards on March 2, 1967[2], and got two other drivers, Andrew Reynolds and Juan Rivera, to sign in the next few days. On March 7 the Teamsters filed a petition for a driver's unit with the Regional Office and about that time wrote Respondent's president and chief executive officer, Walter Solmsen, claiming to represent Respondent's drivers.

About March 8 Solmsen summoned Cruz, told him he had received the letter, told him he did not want to have any unions in his shop, and, according to the credited testimony of Cruz, a credible witness on this subject, offered him a $10-a-week raise if he would forget the Teamsters. Cruz refused the proposition on the grounds that he wanted to stick with his friends and also wanted the Teamsters in the shop. Solmsen verbally accepted Cruz' decision, saying

2. All events herein occurred in 1967.

that he was not going to fight the Teamsters, that 10 years ago when he was younger he could have done that, but that now he was too old for that. After dismissing Cruz he talked with the two other drivers who had signed up, Reynolds and Rivera.

Solmsen's testimonial version of the above interviews was that he called all of the drivers into his office together and did not talk with Cruz individually, that he did not offer Cruz or any other drivers a $10-weekly raise if they would forget the Teamsters. Solmsen admitted that he told the drivers he had received the Teamsters' letter claiming to represent them and that he had asked them if the claim stated in the letter was true.

As Cruz, on this subject, and Robert Geller impressed me as credible witnesses, as Solmsen denied all of Geller's testimony stating that he had no conversation at all with Geller about any union or Geller's union activities, as by his demeanor during some of his testimony Solmsen did not impress me as always a credible witness, and upon the preponderance of the evidence in the entire record considered as a whole, I credit Cruz' version of this interview and find and hold that by offering Cruz the benefit of a $10 raise for forgetting the Teamsters, Respondent violated Section 8(a)(1) of the Act. Of Solmsen's testimony on this subject I credit only his admission that he interrogated the drivers as to their connection with the Teamsters. On direct examination he testified he told the drivers he had received a letter from the Teamsters claiming to represent them and "I wanted to know if this was true." On cross examination he was vague and uncertain as to what he had asked the drivers and said to them. He admitted he may

have asked them if they "call[ed] in the union," and that three of them; Cruz, Reynolds and Rivera replied "Yes," and the fourth, Sojourner, replied that "He didn't sign." As word of his $10 offer to Cruz would certainly have reached the ears of the other drivers, and upon the entire record, I find that Solmsen's interrogation of the drivers reasonably tended to interfere with, restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent thereby further violating Section 8(a)(1).

B. *Shifting of Overtime From Teamster Drivers to Nonteamster Driver*

Prior to his union activity Israel Cruz, a willing worker, was given considerable overtime. Afterwards overtime for Cruz was reduced to the point of being almost eliminated.

Prior to Solmsen's receipt of the Teamsters' letter and his attempt and failure to entice Cruz away from that Union, Cruz had averaged about 13 hours per week overtime during the 10 weeks of 1967. From the moment of those events, which occurred on or about March 8, Cruz received almost no overtime; he averaged less than 1 hour per week. His overtime per week during 1967 prior to his discharge August 28 is set forth below:

PRIOR TO MARCH 8

Week Ending	*Total Amount of Overtime Hours*
1/4	5¼
1/11	10½
1/18	12
1/25	11
2/1	17¼
2/8	10½
2/15	21¼
2/22	8¼
3/1	19½
3/8	13¾

AFTER MARCH 8

Week Ending	*Total Amount of Overtime Hours*
3/15	½
3/22	0
3/29	0
4/5	¾
4/12	1½
4/19	0
4/26	¼
5/3	¾
5/10	¼
5/17	0
5/24	0
5/31	0
6/7	¼
6/14	2½
6/21	2¼
6/28	1¼
7/5	1½
7/12	0
7/19	½
7/26	2¾
8/2	3
8/9	5¼
8/16	0
8/23	½

In terms of his earnings for overtime work, during the 3 months, January, February and March, 1967, Cruz earned $395; and during the 5 months, April through August, he earned $73.

Prior to March 8, Andrew Reynolds, another driver who signed a Teamsters card, had averaged about 6 hours

per week overtime. During the succeeding 8 weeks he averaged about 1 hour overtime per week. Reynolds earned $201 for overtime work during January, February and March, $48.58 for overtime work during April, May and June; and $8.33 for overtime work from July 1 through 26, when he left the Company.

The payroll record for Juan Rivera, the third driver who signed up for the Teamsters, showed little change; he worked but little overtime before or after March 8. Rivera's overtime hours increased somewhat beginning in late July.

In contrast to the reduction of overtime allowed Teamsters Cruz and Reynolds, overtime held steady, and even increased for the fourth driver, Sojourner who, to President Solmsen's knowledge, had not signed up for the Teamsters. Immediately after March 8 he worked about as many overtime hours as he had previously, while Cruz' were reduced to almost zero. For overtime work Sojourner earned $874 during the first quarter of 1967, $916 during the second quarter and $1107 during the third quarter.

In its defense Respondent offered no explanation for the reduction in Reynold's overtime hours and earnings after March 8 and for the increase of Sojourner's. The preponderance of all the evidence strongly suggests that Reynold's teamster alignment and Sojourner's nonteamster alignment, was the controlling factor.

Respondent contended that Cruz was deprived of overtime because of what President Solmsen was told by two detectives when they visited him in his office. Solmsen was vague as to when this visit occurred. He said he believed it took place at the end of February 1967. Then he testified the visit occurred maybe 4 weeks before he received

the Teamsters' letter and that "I don't recall the date." Then he was sure it occurred more than a week before his receipt of the Teamsters' letter. Asked if it was less than a month President Solmsen replied: "It is hard to say. I thing so. Sometime in February, I believe." On this testimony, the only evidence on the subject, I find that the visit occurred in February but not necessarily at the end of February.

According to Solmsen the two detectives told him that they had followed Cruz one Friday night and he drove the company truck, that he had picked up another man and that they suspected that "there was something going on." They did not tell Solmsen what they thought was going on. Solmsen then told Kurt Lobbenberg not to let Cruz take a company truck home any more. Prior to this, the practice was to let some of the drivers, including Cruz, take company trucks home overnight. As Solmsen explained it the drivers would take a load to the post office at 6:30 p. m. and not return to the plant because the plant would be locked up for the night; so the drivers would take the trucks home. Respondent's defense seemed to contend that Cruz was denied overnight use of the truck for a good reason and that the curtailment of his overtime hours resulted from this justified denial of the overnight use of the truck. But Cruz' normal working hours were from 8 a. m. to 4:30 p. m. and there were at least 2 overtime hours, from 4:30 to 6:30 p. m., when the plant was still open and when Cruz was deprived of overtime hours for some reason not connected with the detectives' suspicions and the allegedly justified denial of his overnight use of the truck.

Further, Respondent's curtailment of Cruz' overtime hours began a week or several weeks after the detectives' visit and not immediately thereafter, and intervening incidents were the organization of the drivers by Cruz, the arrival of the Teamsters' letter and petition and Solmsen's interview with Cruz and the other two Teamster drivers.

President Solmsen testified that another reason why he barred Cruz from taking the truck home at night was because he heard that another driver who took over the truck from Cruz found some marijuana cigarettes in the truck. Solmsen never confronted Cruz with this or inquired of him concerning it. Cruz was arrested in June or July 1967, on suspicion of passing narcotics, and his case was dismissed by a court sometime after his discharge on August 28. In any case, this defense would not explain why Cruz was deprived of overtime work between 4:30 and 6:30 p. m.

Upon the above facts and considerations, as Respondent's defense was not fully convincing, and upon the preponderance of the evidence in the entire record considered as a whole, I believe and hold that the primary reason Solmsen abruptly reduced Cruz' overtime hours, particularly the overtime hours frm 4:30 to 6:30 p. m., was because of the latter's union activities and sympathies and his refusal to abandon them at Solmsen's suggestion, and in order to discourage further membership in, and activity on behalf of, the Teamsters, Respondent thereby violating Section 8(a)(3) and (1) of the Act. I find that additional, subordinate reasons for curtailing Cruz' overtime hours after 6:30 p. m. were Solmsen's suspicions of him after the detectives' visit and after his subsequent arrest and what Solmsen heard about marijuana cigarettes.

C. *Assistance to Local 106*

A week or so after President Solmsen's unlawful interrogation and promise and the sudden curtailment of Cruz' overtime, in mid-March, Elliott Klein and Kurt Lobbenberg (herein called Loeb, as he was called in the plant) assisted another Union, Local 106, by urging employees to sign its cards and telling them such things as that it was a good union that Solmsen was not against it and said it was okay. Loeb actually passed out some of the Local 106 cards and called and urged employees to sign them. Most of this activity by Klein and Loeb occurred one afternoon in or near the shipping department, while Local 106 organizers were standing in the shipping bay, which is a roofed-over area within company premises. Klein told one employee who protested that this Union was not a machinist's union, that they didn't have any choice and that it was either "these people or the Teamsters."

In addition, sometime in March, President Solmsen himself asked Employee Robert Geller, an inspector, to sign a Local 106 card as a personal favor to him. Solmsen summoned Geller and asked him if he was satisfied with his employment. Geller replied that he was. Solmsen asked if he had any complaints or beefs. Geller replied that of course he did, that everybody does. Solmsen remarked that he was having union trouble, which he supposed Geller was aware of. Geller allowed that he knew and Solmsen said he was very unhappy about this state of affairs and that he wanted to run his own company. Solmsen then asked Geller if he would sign a Local 106 card as a favor to Solmsen. Geller replied he could not do that, especially since Solmsen had "handled the thing so badly with people like Elliot and Kurt publicly asking

people to support this union. I didn't want to become associated with anything of that sort." Solmsen replied that Geller should think it over, which Geller agreed to do.

A day or so later Geller told Solmsen he had thought it over and could not see his way clear to signing a Local 106 card, but that Geller would not oppose Local 106 "if that was what he wanted to do."

Shortly thereafter Geller became active in the plant on behalf of District 65, and shortly after that Solmsen called Geller in again and asked him why he had changed his mind; Geller had said he wouldn't "oppose it and now I was . . . involved . . . and he wanted to know why I was involved . . . . So I told him, that I thought the people needed a union." Solmsen then said that if Local 106 got in the shop "really nothing would change" and that Geller's personal position would not change.

This testimony by Geller, which I credit, together with Klein's statement to an employee that there was no choice, that it was either "these people"—Local 106—"or the Teamsters," proves that Respondent through Solmsen was attempting to block and overcome the drivers' choice of the Teamsters with Local 106, which Solmsen considered harmless to him. (Local 106's petition, filed March 22, sought a broad production and maintenance unit, including the shipping employees and the drivers.) This testimony also proved that in assisting Local 106 as they did Loeb and Klein were carrying out Solmsen's and Respondent's policy, were acting on behalf of Respondent and not on behalf of the employees. Respondent did not deny that Loeb and Klein assisted Local 106, but contended that Respondent was not responsible for their actions because they were not supervisors within the meaning of the Act.

President Solmsen's interrogation of Geller as to why he had changed his mind and why he was involved reasonably tended, under all the circumstances then current in the plant, to interfere with, restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent thereby further violating Section 8(a)(1).

KLEIN

Klein is Respondent's purchasing clerk. He has worked for Respondent for 13 years, during which his salary on the job has gone up from $70 a week to $205 a week. By virtue of his loyalty, his trustworthiness, his long service, his willingness to work long hours without overtime pay and probably other factors and traits of character, he now exercises more company power than would normally be exercised by a purchasing clerk. In addition to maintaining proper inventory of materials and performing other duties as purchasing clerk, he also has something to do with the hiring of employees and employee relations.

The record showed that at least three new hires, Edwards, Garay and Cruz, were employed by Klein without their first talking with President Solmsen. Klein interviewed each of them, processed the papers, asked each when he wanted to start and, without first talking with President Solmsen insofar as the record concerning the individual hirings revealed, hired them. When they reported for duty they did not first meet Solmsen, and Klein introduced them to their foremen who put them to work.

When Cruz had his driver's license revoked in November 1965, he reported that fact not to Solmsen but to Klein.

Klein processed Cruz' removal from the payroll as a lay-off, thereby enabling the latter to collect unemployment insurance. When Cruz had his license restored, he reported that fact not to President Solmsen but to Klein. Cruz went to the plant, showed Klein his license and the latter told him to start to work the following day. There was no evidence that President Solmsen was consulted on the serverance or rehire of Cruz.

Employee Perez left Respondent's employ for 10 months and filled out an application for rehire in January 1967. Klein gave him the application. Klein later called Perez at home and told him to report to work. There was no evidence that President Solmsen was ever consulted concerning this specific application.

Klein testified that he has nothing to do with the hiring of employees, that Solmsen makes all the decisions as to hiring, that all Klein does is receive the applications, make sure they are correctly filled out and turns them over to Solmsen without notations or recommendations. Klein testified that when Solmsen selects a man for hire Klein completes the paperwork, such as making out a record card, timecard, etc., and takes the man into the factory, shows him the timecards and clock, tells him the working hours and turns him over to the foreman.

Contrary to credible evidence by the employees of the participation by Klein in the aobve-specific hirings, the latter testified that he never interviews applicants and that Solmsen does that. Contradicting Klein, President Solmsen testified that Klein often interviews applicants when Solmsen does not have time, that Solmsen makes his decisions based upon his own interviews with the applicants

and sometimes by just looking at their paper records. Solmsen admitted that Klein sometimes makes oral recommendations, that Klein "may say that the man doesn't seem the proper man for us. Sometimes he says this looks like a good prospect, and I do the interviewing myself." Solmsen testified that he himself hires "almost everyone we hire" and that "basically I have my own opinion about every employee that I ever interviewed." On cross examination Solmsen testified that when he is too busy and does not personally interview applicants "then usually we don't hire them."

Of note is Loeb's testimony that after Cruz' discharge Solmsen told Loeb that he had instructed Klein to find another driver.

Upon this testimony and upon the preponderance of all the evidence, it appears, and I find, that when President Solmsen does not interview applicants they are usually not hired and Solmsen relies, at least in part, upon Klein's observation that the applicant would not make a suitable employee; when Solmsen does interview applicants his decision to interview them is based, at least in part, upon Klein's observation that the applicant looks like a good prospect. As Solmsen is a busy executive who attempts to run a "one-man business," it appears probably to me that he relies more heavily on Klein than either of them admitted for recommendations concerning hirings. Upon the preponderance of the evidence I hold that Klein had authority, in the interest of Respondent, effectually to recommend the hire or rejection of applicants, and that the exercise of such authority required the use of independent judgment. It follows that Klein was and is a supervisor

within the meaning of the Act and that Respondent was responsible for his assistance to Local 106.

LOEB

In a representation hearing (29-RC-647) in March 1967, on direct examination by his own counsel, President Solmsen testified that the foreman of the shipping department and the truckdrivers was *Kurt Loeb*. In the hearing before me Solmsen attempted to repudiate this testimony on the ground that "the definition at that time was not as clear to me as it is today." An additional explanation was that "I may have been very excited, I don't know . . . I get carried away." Solmsen admitted he was not familiar with the definition of "supervisor" in the Act.

Working in the shipping department are Loeb, a regular packer named Ventura, several drivers and sometimes other employees temporarily assigned to him to help pack. Loeb gets the additional helpers by asking Solmsen for them and Solmsen relies upon his judgment as to the need. The drivers pack when they are not driving. Loeb receives the written orders accompanying the finished products as they come from the manufacturing departments, and he also receives verbal orders from Solmsen concerning priorities, must items, where to deliver the packages and where to pick up packages. Loeb is the dispatcher of the drivers in the full meaning of that term and he receives their phone calls and directs their next assignment when they call in from their runs for more orders. If the delivery of "must" orders requires overtime by some drivers, usually Solmsen decides what drivers will work overtime, but sometimes Loeb does. Sometimes Solmsen tells Loeb to let all go home but one driver and one packer, and Loeb does that,

deciding himself which driver and packer shall remain overtime and work.

Loeb is paid $3.25 per hour. Ventura is paid $2.05. The highest paid drivers receives $2.25 per hour. Thus Loeb is by far the highest paid person in the shipping department. He takes his orders directly from the president of Respondent and from no one else. If he is not a supervisor then Respondent operates its important wrapping, shipping and truckdriving operations without any one having supervisory authority other than the president of the Company. President Solmsen has a business to run and some 90[3] employees and 7 foremen to supervise. It is inconceivable to me that he undertakes to direct and assign the six or more shippers and drivers personally and not through one having supervisory authority. In this connection I note that when Cruz was originally hired in March 1965, Klein took him to Loeb and introduced Loeb as foreman of the shipping department and in charge of the drivers. Upon the preponderance of the evidence I believe and hold that Loeb has authority, in the interest of Respondent, responsibly to direct employees and that the exercise of such authority requires the use of independent judgment. It follows and I find that Loeb is, and was at all times material herein, a supervisor within the definition of the Act.

My final conclusion on this subject is that Respondent is responsible for the assistance Klein and Loeb gave Local 106 because Klein and Loeb were supervisors. By Solmsen's, Klein's and Loeb's assistance to Local 106 Respondent violated Section 8(a)(1) and (2) of the Act.

3. This figure comes from Solmsen's testimony in the representation case.

D. *The Discharge of Israel Cruz*

Cruz worked for Respondent as a truckdriver from March until November 1965, and from April 1966 until his discharge by President Solmsen on August 28, 1967. As has been seen above, following his signing up a majority of the drivers into the Teamsters, President Solmsen told Cruz he did not want the Teamsters in his shop and offered him a $10 raise if he would forget the Teamsters. Cruz replied he wanted to stick with his friends and wanted the Teamsters in the shop. Almost simultaneously Solmsen interrogated other drivers concerning their union activities. As was found above Respondent then assisted another union, Local 106, and shifted overtime from teamster to nonteamster drivers, in order to stop the Teamsters and in violation of Section 8(a)(1), (2) and (3) of the Act. The issue is whether Cruz' discharge was in any way motivated by the same antiteamster considerations, or whether, as Respondent contended, he was discharged solely because of his absentee record and his failure to bring in a doctor's certificate.

During the period from Mid-March 1967 until his discharge, Cruz had a bad absentee record which, on the witness stand, Cruz attributed to illness. During working days he was absent 26 days as follows: 2 days in March, 6 days in April, 3 days in May, 5 days in June, 4 days in July and 6 days in August.[4] Cruz attributed his absences to "stomach trouble." A doctor's note referred to his illness of August 24-26 as "bronchial asthma and gastritis."[5]

4. He was absent March 17, 24; April 5, 6, 13, 14, 21, 28; May 15, 16, 29; June 5, 19, 20, 21, 30; July 5, 6, 7, 18 and August 15, 16, 22, 23, 24, 25.

5. This note was not obtained until December 1, 1967, 3 days before the hearing.

Respondent sought, unsuccessfully, to prove, but surely suspected, that during some of these absences Cruz was driving a taxi,[6] which he frequently did weekends and holidays. Cruz' testimony about his illness was not fully convincing.

President Solmsen credibly testified that he questioned Cruz concerning his absences several times in July and August and that Cruz replied he had been sick. Once in August, according to Solmsen's and Klein's credible and credited testimony, Solmsen raised the matter of his attendance with Cruz and warned him that thereafter if he was absent he would have to have a legitimate excuse or, in the event of illness, a doctor's note.

Cruz was ill and absent from work on August 22 through 25; Tuesday through Friday. On Thursday he visited the medical doctor, who, as has been seen above, diagnosed the illness as "bronchial asthma and gastritis." However, Cruz did not at that time get a written note from the doctor. Also on Thursday, Solmsen sent a message to Cruz, through Ventura, to the effect that Cruz was not to return to the plant because of his unexcused absence. Ventura told Loeb that Cruz was sick, presumably after he returned from calling on Cruz. Loeb relayed the message to Solmsen. Sometime during his illness Cruz asked Employee Rivera to tell the plant he was sick, but the record does not show on what day this was.

Cruz returned to the plant early Monday morning, August 28, and was waiting there when Solmsen came in. Solmsen told him he had sent word to him that he was dis-

6. Cruz drove a taxi on March 18, 19; May 28, 30; June 4, 24 and July 1, 2, 8 and 15. Each of these days was either a Saturday, Sunday or a holiday.

charged. Cruz told him he had been sick. Kurt Loeb, who overheard the conversation, testified that both of them began to talk loudly.

On the witness stand Cruz and Solmsen disputed each other as to the rest of his terminal interview. Cruz testified, incredibly as it seemed to me, that he started to pull out his wallet from a pocket to show Solmsen some written proof[7] that he had been ill and was, in effect, prevented from doing so by Solmsen's statement that he did not want to see anything, that Cruz should go home and that Solmsen did not want to see him at the plant anymore. Cruz testified that he replied he knew Solmsen was the boss but that Cruz was going to report this discharge to the Labor Board "because you don't want me to show you the proof." Loeb, who by his demeanor as a witness impressed me as a credible witness, testified that he was close at hand and heard the conversation; and that Solmsen asked Cruz if he had a doctor's certificate and said that if he did not have he was fired; that after argument between them Solmsen told Cruz that if he had "something from a doctor, a certificate—I don't remember the exact expression, then I will reinstate you."

Solmsen's version was that when Cruz told him he was sick Solmsen replied that he was "sick of his being sick," that Cruz was fired, and that unless Cruz brought him a doctor's certificate he would not reinstate him. Solmsen credibly testified that Cruz added that "he was sick, he doesn't have to bring me this [doctor's] statement, he is going to the Labor Board and he knows what is going to

7. These documents were two "requests for laboratory examination and report" stamped August 25, 1967, which Cruz testified he received at Belleview Hospital on August 25.

happen to me, and after that was said, I could not understand him anymore because he spoke in Spanish." Solmsen testified Cruz offered to show him no documents and "made no attempt . . . . to show me his wallet or any other document." Solmsen testified further that he discharged Cruz because

> I needed a driver who would work regular hours. I could not depend on him as a regular driver. There were many a time, especially on Fridays, when we were full with work, and a driver wasn't there, and I couldn't replace a driver. So there was no choice for me. I was bending over backwards—not to fire the man and I carried on for about four or five months with all that nonsense, but then it finally broke the camel's back, and I wouldn't have fired him if he would have come with a doctor's certificate, like other people. It is our policy. All I needed was a doctor's certificate, and I wouldn't have fired the man. I would have carried him, in spite of all his troubles.

Upon the above facts and considerations and the preponderance of the evidence I believe and find that Solmsen discharged and refused to reinstate Cruz solely because of his recurring and unexcused absences and not at all because of his union activities. Since Cruz' union activities 5 months before, Solmsen had been long suffering and forebearing towards Cruz and had overlooked plenty of opportunity to discharge Cruz for absenteeism as Cruz was absent 22 days, 6 of which were on Fridays. He overlooked these opportunities even though he was depriving him of overtime. There were no current unfair labor practices[8]

8. The deprivation of overtime continued, but Solmsen decision on this had been made back in March.

and there was no current union activity.[9] There was no evidence that Solmsen was lying-in-wait to find a pretext to discharge Cruz. Had he been lying-in-wait he could have jumped much sooner with good cause. Solmsen's requirement of a doctor's statement the next time Cruz was absent, was a reasonable requirement under all the circumstances. Cruz' ignoring of this requirement and his failure to bring a doctor's certificate after his 4 days' absence, Tuesday through Friday, August 22-25, justified Solmsen's feeling that this was "the straw that broke the camel's back." Cruz' statement to Solmsen during the severance interview that he did not have to bring in a doctor's certificate and that he was going to the Labor Board showed that Cruz erroneously thought the Act permitted him, in view of his earlier union activities, to ignore a reasonable company requirement. This statement and Cruz's absentee record suggest that Cruz may have ben taking advantage of Respondent since his union activity, with the thought that he was immune from discharge because of his earlier union activity.

Upon the preponderance of the evidence in the entire record considered as a whole, I hold that Solmsen discharged Cruz for cause and not in violation of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce

9. Although the representation issue had not been resolved, it was held up by the filing of the original charge herein on April 20, 1967, alleging assistance to Local 106.

among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Respondent from March 8, 1967, until Cruz' discharge, having deprived him of overtime pay because of his union activities, and Respondent's defense having given no satisfactory explanation for this deprivation between the hours of 4:30 and 6:30 p. m., I recommend that Respondent make Cruz whole for this discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as overtime pay during this period between 4:30 and 6:30 p. m. As during the first quarter of 1967, Cruz and Sojourner each averaged no less than 13 hours' overtime per week, which would have included 10 hours' overtime, 5 days a week from 4:30 to 6:30 p. m.; and as Sojourner's overtime continued thereafter to average at least 2 hours per day, it follows that but for the discrimination against him, Cruz would have continued earning at least 2 hours' overtime pay each day he was working at 4:30, the beginning of the overtime, between March 8 and his discharge. I therefore recommend that Respondent make Cruz whole by paying him 2 hours' overtime pay for each of the days he worked up to 4:30 p. m. between March 8 and August 28, 1968. As Respondent's suspicions of Cruz after the detectives' visit, after the report about marijuana cigarettes and after his arrest in June or July,

may have justified its denial of Cruz' overnight use of the truck after 6:30 p. m., I do not recommend any overtime backpay for Cruz after 6:30 p. m. In my judgment, Solmssen was justified on suspicion alone, after the detectives' visit, in withdrawing the privilege of overnight use of the truck after 6:30 p. m.

Respondent having discriminatorily deprived Andrew Reynolds of overtime pay between March 8 and July 26, 1967, and the record having suggested no reason why his overtime would not have continued in the same average amount in the second and third quarters of the year as in the first, I recommend that Respondent make Reynolds whole by payment to him of overtime pay each day he worked for Respondent after March 8, 1967, equal to his average overtime pay per day he worked during the first quarter.

In view of the nature of Respondent's violations of the Act, I recommend a broad cease-and-desist order.

Upon the basis of the foregoing findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. A & S Electronic Die Corp. and A & S Steel Rule Die Corp., of Brooklyn, New York, are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 106, Local 807, and District 65, are each labor organizations within the meaning of Section 2(5) of the Act.

3. By promising an employee a raise if he would abandon his union affiliations, by interrogating employees as to

whether they had signed up with a union, and by interrogating an employee as to why he had changed his mind and was now involved with a union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By reducing the overtime hours of employees because of their union activity and to discourage membership and activity in a union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By assisting a union in its efforts to sign up employees of Respondent, for the purpose of blocking and overcoming its employees' choice of another union, Respondent has interfered with the formation of a labor organization, and has contributed support to it, thereby violating Section 8(a)(2) and (1) of the Act.

6. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the preponderance of the evidence in the entire record considered as a whole, I recommend that A & S Electronic Die Corp. and A & S Steel Rule Die Corp. of Brooklyn, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising employees raises if they will abandon their union affiliation.

(b) Unlawfully interrogating employees as to whether they have signed up with a certain union, why they have changed their mind and have become involved with a union.

(c) Reducing the overtime hours of employees because of their union activity and to discourage membership and activity of its employees in a union.

(d) Assisting a union in its efforts to sign up employees of Respondent, for the purpose of blocking and overcoming any of its employees' choice of another union.

(e) In any other manner interfering with, restraining or coercing its employees on the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization of their choice, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole Israel Cruz and Andrew Reynolds for any loss of overtime pay they may have suffered by reason of the discrimination practiced against them, in accordance with the recommendations set forth in the above section entitled "The Remedy."

(b) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the rights of employees under the terms of this Recommended Order.

(c) Post at its plant in Brooklyn, New York, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 29 (Brooklyn, New York) shall be posted by Respondent after being duly signed by its representative, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.[11]

Dated at Washington, D. C., May 16, 1968.

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10. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

11. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

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In the Supreme Court of the United States

OCTOBER TERM, 1970

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 423 F. 2d 218. The Board's decision and order (Pet. App. A18-A49) are reported at 172 NLRB No. 168.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1970 (Pet. App. A13-A17). On August 3, 1970, Mr. Justice Brennan extended the time for fil-

ing a petition for a writ of certiorari to August 25, 1970. The petition was filed on August 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that petitioners violated the National Labor Relations Act by promising an employee a raise if he would abandon his union affiliation, interrogating an employee concerning his union membership and activities, supporting the organizational efforts of one union, and reducing the overtime hours of an employee because of his union activities.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. 2-4).

STATEMENT

A & S Electronic Die Corp. and A & S Steel Rule Die Corp. (collectively herein the Company) are affiliated companies which are operated as a single business enterprise. On March 2, 1967, Israel Cruz, one of the Company's four truck drivers, signed a card authorizing Local 807 of the International Brotherhood of Teamsters to be his bargaining representative. In the next few days, he also secured

the signatures of two of his fellow drivers, Andrew Reynolds and Juan Rivera (A. 22; 102-103).[1] He turned the cards over to the Teamsters which, on March 7, filed a petition with the National Labor Relations Board for an election in a unit limited to the four drivers. At the same time, the Teamsters wrote to Walter Solmsen, the Company's president, requesting recognition as collective bargaining agent for the drivers (A. 22; 103, 164, 166).

The next day Solmsen summoned Cruz to his private office and told him that he had received the letter from the Teamsters (A. 22; 103-104). He stated that he did not want unions in his shop and offered Cruz a $10 a week raise if he would "forget the union" (A. 22; 104). When Cruz rejected the offer, Solmsen stated that, if the men wanted a union, he would not fight it (A. 22; 104). The three other drivers—Reynolds, Rivera, and John Sojourner—then arrived at Solmsen's office. He told them that the Teamsters claimed to represent a majority and asked if this were true. Reynolds and Rivera both admitted that they had signed authorization cards for the Teamsters, but Sojourner said that he had not (A. 22-24; 166, 171-172).

About a week later, organizers of Local 106 of the International Production, Service and Sales Union appeared at the Company's truck bay during the lunch hour and urged the approximately dozen employees there to sign with that union. Also present were

[1] "A." refers to the portions of the record printed as an appendix to the parties' briefs in the court below.

Elliot Klein, the Company's purchasing clerk, and Kurt Lobbenberg, its shipping foreman, both of whom were found by the Board to be supervisors within the meaning of Section 2(11) of the Act. Lobbenberg passed out authorization cards for Local 106, while Klein urged the employees to sign, stating "it is a good union, sign the card" and "the boss won't mind" (A. 29; 53-55; 62, 66, 70, 73-74, 78-80, 86-87, 93-95, 96-97).

Shortly thereafter, President Solmsen summoned employee Robert Geller to the Company's office and told Geller that "the company was having union difficulties" and that "he was very unhappy about this state of affairs." He then asked Geller if he would sign a Local 106 card "as a favor." Geller declined, saying that Solmsen "had handled the thing so badly with people like Elliot and Kurt publicly asking people to support this union" that he did not want to become associated with it. Later, however, Geller told Solmsen that he would not oppose Local 106 (A. 29-30; 55-57).

Not long after this conversation, Geller became active in the organizational efforts at the Company of District 65 of the Retail, Wholesale and Department Store Union, AFL-CIO. When Solmsen became aware of this, he called Geller into his office again and asked him why he was "involved" with District 65 since he had said that he would not oppose Local 106. Geller replied that he felt District 65 would be the best union for the employees. Solmsen ended the conversation by telling Geller that "really nothing would change if 106 did get in the shop" and that Geller's

"personal position wouldn't change" (A. 30; 57).

Prior to the receipt by Solmsen of the letter from the Teamsters, both Cruz and Reynolds were assigned substantial overtime work. Following Solmsen's March 8 interviews with the drivers, the overtime of both these employees was reduced to less than one hour per week, while that of Sojourner, the only driver who had not signed a Teamster's authorization card, was significantly greater (A. 24-26; 177-180, 183-184). Rivera, who also signed a Teamsters' authorization card, had received little overtime work prior to March 8 and his situation remained unchanged (A. 26; 181-182).

The Board found that the Company violated Section 8(a)(1) of the Act (interference with or restraint or coercion of employees in the exercise of their right to form a labor organization) by promising Cruz a $10 per week raise if he would abandon his union affiliation and by interrogating Reynolds, Rivera, Sojourner, and Geller concerning their union membership and activities. The Board also found that Company President Solmsen's solicitation of Geller to sign a Local 106 authorization card and the distribution of that union's cards by supervisors Klein and Lobbenberg constituted assistance to Local 106 in violation of Section 8(a)(2) of the Act (interference with formation of a labor organization). Finally, the Board found that the company violated Section 8(a)(3) of the Act (discrimination with regard to employment to encourage or discourage membership in a labor organization) by reducing the overtime hours of Reynolds and Cruz because of their union mem-

bership and activities. (Pet. App. A9, A28, A32, A35, A39, A46-A47.) The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with its employees in the exercise of their rights guaranteed by Section 7 of the Act, and to make whole the employees discriminated against for their loss in overtime pay (Pet. App. A47-A49).

The court of appeals (District Judge Tyler dissenting in part) sustained the Board's findings and conclusions with respect to the unlawful promise of benefit to Cruz, the interrogation of Geller, the illegal assistance to Local 106, and the discriminatory denial of overtime to Reynolds. The court ruled, however, that the purpose of the interrogation of drivers Reynolds, Sojourner, and Rivera was to determine the majority status of the Teamsters and that it was neither threatening nor coercive. The court also reversed the Board with respect to the reduction of Cruz's overtime, holding that his improper use of the Company truck justified the Company's action.[2] (Pet. App. A5-A9.)

ARGUMENT

Petitioners' contentions that the interrogation of Geller was not coercive, that no benefit was promised to Cruz to discontinue his union activities, and that Reynolds' loss of overtime was not attributable to his union activity present only evidentiary issues

[2] There was some evidence that Cruz had used the Company truck for the transportation of narcotics (Pet. App. A32).

which do not warrant review by this Court, since the court below found there was substantial evidence to support the Board's findings.[3] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Moreover, the facts summarized in the Statement (*supra*, pp. 2-6) show that there is ample support for those findings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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National Labor Relations Board.
AUGUST 1970.

[3] Although the questions presented (Pet. 2) also purport to challenge the Board's finding of illegal assistance to Local 106, there is only passing mention of that question (Pet. 8-9), which also raises only an evidentiary issue.

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